SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 14 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-996

NATIONAL ASSOCIATION OF MEAT PURVEYORS
and
NATIONAL RESTAURANT ASSOCIATION,
Petitioners,

vs.

EARL L. BUTZ, Secretary, Department of Agriculture, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

The National Association of Meat Purveyors (NAMP), and the National Restaurant Association (NRA), petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit (Court of Appeals) entered in these proceedings on November 19, 1975.

OPINIONS BELOW

The opinion of the District Court for the District of Nebraska (District Court) is reported at 395 F. Supp. 923 (D. Neb. 1975) and is reproduced in Appendix A hereto along with the District Court's unreported order.[1] The opinion of the Court of Appeals is not yet reported but is reproduced in Appendix B hereto. The Court of Appeals Order denying Petitioner's Petition for Rehearing with Suggestion For Rehearing En Banc is not reported.

———o———

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1975. A timely Petition for Rehearing With a Suggestion for Rehearing En Banc, was denied by Order of the Court of Appeals on December 15, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(2).

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1 In addition to Earl L. Butz, Secretary of the United States Department of Agriculture, respondents are Edwin L. Peterson, Administrator of the United States Department of Agriculture, Andrew Rot, Supervisor of the Meat Grading Branch of the United States Department of Agriculture at Omaha, Nebraska, and American National Cattlemen's Association (ANCA), appellants below. The Consumer Federation of America, National Consumers League, Americans for Democratic Action—Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutter and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO) and American Federation of Teachers (AFL-CIO) have previously filed herein their petition for writ of certiorari docketed in this Court as Case No. 75-940.

QUESTIONS PRESENTED

1. Whether the Court of Appeals in finding that the District Court had exceeded the proper scope of review and conducted a trial de novo did so in contradiction of the established precedents set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U. S. 402, 28 L. Ed. 126, 91 S. Ct. 814 (1971), *National Nutritional Foods Association v. Weinberger,* 512 F. 2d 688 (2d Cir. 1975) and *South Terminal Corp. v. Environmental Protection Agency,* 504 F. 2d 646 (1st Cir. 1974).

2. Whether the Court of Appeals erred when it concluded that the failure of the United States Department of Agriculture (USDA) to follow Executive Order No. 11821, 39 Fed. Reg. 41501 (1974) (Executive Order) was not judicially reviewable, and that even if it was, petitioners lacked standing to obtain such judicial review.

3. Whether petitioners, on appeal, were entitled to rely on additional grounds presented to the trial court for affirmance of its decision without cross-appeal.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Article 4, Section 3 of the United States Constitution:

> "He shall, from time to time, give to the Congress information on the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the Time of Adjournment, he may adjourn them to such time is he shall think proper; he shall

receive Ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

STATUTES

1. Agricultural Marketing Act of 1946, 7 U. S. C. § 1621 et. seq. Pertinent provisions of this statute are set forth in Appendix D *infra*, pp. D. 1-D. 2.

2. The Wage and Price Stability Act, 12 U. S. C. § 1904 (Supp. 1975). Pertinent provisions of this statute are set forth in Appendix D *infra*, pp. D. 2-D. 3.

3. The Administrative Procedure Act, 5 U. S. C. § 553(c) and 5 U. S. C. § 706(2)(A). Pertinent provisions of this statute are set forth in Appendix D *infra*, pp. D. 3-D. 4.

MISCELLANEOUS

1. Executive Order No. 11821, 39 Fed. Reg. 41501 (1974). This Executive Order is set out in full in Appendix D *infra*, pp. D. 4-D. 6.

2. Office of Management and Budget Circular No. A-107 as more fully set forth in Appendix D *infra*, pp. D. 6-D. 10.

STATEMENT OF THE CASE

This action commenced on April 11, 1975, when the United States District Court for the District of Nebraska (District Court) entered a preliminary injunction preventing the USDA from implementing new carcass beef

grading standards, (Revisions) 7 C. F. R. § 53.1 et seq. The Petitioner NAMP is a national association of meat purveyors comprising some 425 members located throughout the United States, Canada, and Mexico; Petitioner NRA is a national association of some 125,000 restaurants and some 1,500 members throughout the United States.

The preliminary injunction issued by the District Court was affirmed by the Court of Appeals which ordered the District Court to conduct a "plenary hearing." See Appendix C *infra*, pp. C. 1-C. 4. At this hearing, Petitioners NAMP and NRA successfully intervened. At the conclusion of said hearing, the District Court entered an order permanently enjoining implementation of the revisions. See Appendix A *infra*, pp. A. 24-A. 25.

On appeal, the decision of the District Court was reversed by the Court of Appeals. The Court of Appeals held that:

(a) The failure of the USDA to comply with the mandate of Executive Order No. 11821 in promulgating the revisions was an infirmity not judicially reviewable, and that in any event petitioners lacked standing to seek said judicial review.

(b) The failure of petitioners to cross-appeal the finding of the District Court that there was substantial evidence to support the Revisions relieved the Court of Appeals of the obligation of considering other grounds advanced by the petitioners which went to the issue of the arbitrary and capricious nature of the Secretary's action.

(c) The District Court conducted a de novo review when it received expert testimony to augment the administrative record, and relying on it in making its final decision.

(d) In its independent determination, the Revisions as they relate to yield grading only were not arbitrary and capricious.

(e) That the action of the Secretary in promulgating the revisions making yield grading mandatory is not beyond the scope of his authority or in violation of the Agricultural Marketing Act of 1946, 7 U. S. C. § 1622 et seq.

———o———

STATEMENT OF FACTS

A. Background

On March 12, 1975, the Secretary caused the Revisions to be published in the Federal Register, which were to go into effect on April 14, 1975 (40 Fed. Reg. 11535).

The Revisions called for the lowering of the quality grades now used to measure the palatability of beef sold to the American public. The Revisions also make mandatory a quantitative grading of beef (that is the amount of muscle in relation to fat and bone in a carcass, i. e., cutability) on all beef graded for quality. The effect of the Revisions of the quality grades will be that the producer will be able to market beef of less quality at a higher price while the consumer will be purchasing lower

quality beef at a higher price, meaning that the price spread between the producer and consumer will be increased. At present, both the qualitative and quantitative analysis of beef carcasses are performed by the USDA on a voluntary basis.

Prior to the publication of the Revisions in the Federal Register, the President of the United States issued Executive Order No. 11821 (Fed. Reg. 41501) (1974) which required among other things that the Secretary advise the Office of Management and Budget as to the inflationary impact of the Revisions. Despite the nature of the Executive Order, the Secretary disregarded same and sought implementation of the Revisions without complying with it.

B. Proceedings Below

Prior to the effective date for the implementation of the Revisions the District Court issued a preliminary injunction enjoining the implementation of the Revisions on the application of the Independent Meat Packers Association (IMPA). This preliminary injunction was upheld by the Court of Appeals, 514 F. 2d 1119 (8th Cir. 1975), which ordered the District Court to conduct a "plenary hearing." At the conclusion of the plenary hearing the District Court permanently enjoined the implementation of the Revisions, 395 F. Supp. 923 (D. Neb. 1975). The District Court's decision was reversed by the Court of Appeals, and Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

This Court should issue a writ of certiorari in order to resolve the conflict which now exists between the First Circuit, Second Circuit and the Eighth Circuit Courts of Appeal with regard to the question of the scope of review allowed under 5 U. S. C. § 706 (2) (A).

In conducting a "plenary hearing" the District Court followed the guidelines set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402 (1971). The Courts of Appeal for the First and Second Circuits have interpreted this precedent as allowing, when needed, the introduction of expert testimony to aid the reviewing court in determining the question of whether or not an administrative agency acted within the scope of its authority, contrary to law, in abuse of its discretion or in an arbitrary and capricious manner. The Court of Appeals for the Eighth Circuit has, in the instant case, given the opinion that under no circumstances can expert testimony be introduced as part of the trial court's judicial review.

This Court held, in *Citizens to Preserve Overton Park, Inc., supra*, that:

> "Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . .' To make these findings the Court must consider whether the decision was based on a consideration of the relevant

> factors and whether there has been a clear error of judgment . . . although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the evidence." 401 U. S. 402 at 416.

In remanding the case to the District Court for a "plenary review" of the Secretary's decision, in *Overton Park, supra*, this Court noted that the review should be based on the full administrative record and that the District Court may require "administrative officials who participated in the decision, to give testimony explaining their action," 401 U. S. 402 at 420. This Court also suggested that the Secretary might prepare additional information for the District Court's review, cautioning that such "post-hoc rationale should be reviewed critically." This Court concluded by stating:

> "If the District Court decides that additional explanation is necessary, the Court should consider which method will prove the most expeditious so that full review may be had as soon as possible." 401 U. S. 402 at 420-21.

At the heart of the reason for granting the Writ is the interpretation to be given the language used by this Court in *Overton Park, supra*, to-wit:

> "Thus it is necessary to remand the case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the base record may not disclose the factors that were considered by the Secretary's construction of the language, it may be necessary for the District Court to require some explanation in order to determine if

> the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." 401 U. S. 402 at 420.

The exclusion of expert testimony from the judicial scope of review by the Court of Appeals is contrary to the decision of the Court of Appeals for the First Circuit in *South Terminal Corp. v. Environmental Protection Agency,* 504 F. 2d 646 (1st Cir. 1974). There, the First Circuit, in following the dictates of this Court in *Overton Park,* allowed the introduction of expert testimony and stated:

> "The normal way courts evaluate a technical issue is through procedings attended by expert witnesses. Yet, as an Appellate Court, we cannot conduct such fact-finding proceedings on our own. Congress has not interposed a District Court in the chain of review, so we cannot remand for clarifying findings of fact based perhaps on testimony by Agency and private experts. *Cf. Camp v. Pitts,* 411 U. S. 138, 142-143, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1972) . . . But when the question is one which the agency may never fully have confronted, and which may deserve further input both from agency and outside sources, only a remand for further hearings and an extended record seems adequate." 504 F. 2d at 665.

In *National Nutritional Foods Association v. Weinberger,* 512 F. 2d 688 (2d Cir. 1975), the Second Circuit citing *Overton Park, supra,* as authority directed the District Court to hold a hearing including, if necessary, testimony directed at the agency's *reasoning* by promulgating certain rules with regard to the classification of vitamins. It stated that the case at bar was:

> ". . . substantially similar to that encountered in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, *supra*, and the remedy prescribed by the Supreme Court in that case appears to be appropriate here. Accordingly, we remand the case to the District Court with directions to conduct an *Overton* type hearing (including such affidavits or testimony as to the commissioners' reasoning as the Court determines necessary) for the purpose of determining whether, upon the entire administrative record before the Commissioner which the Court should scrutinize . . . the Commissioner acted irrationally in classifying the higher Vitamin A and D dosage levels as a drug . . ." 512 F. 2d at 703.

After this Court's decision in *Overton Park*, supra, and pursuant thereto, the District Court for the Western District of Tennessee conducted a hearing pursuant to its directives, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873 (W. D. Tenn. 1972). That Court interpreted the dictates of this Court as allowing the introduction by plaintiffs of expert testimony to evaluate the investigation done by the Secretary of Transportation in determining the appropriate highway routes through the City of Memphis.

It is important that this Court resolve the questions relating to the scope of judicial review when expert testimony is involved to analyze the findings or lack thereof of an administrative agency. It should be noted that on remand the District Court for the Western District of Tennessee went beyond the District Court in the instant case and allowed expert testimony on the thought processes utilized by the agency in making its determinations.

II.

This Court should grant a writ of certiorari to pass on the nature of Executive Orders issued by the President of the United States and the standing of private litigants to enforce same against agencies of the executive branch of government.

It is well established that an executive order, validly enacted pursuant to the Constitution or an act of Congress, is to be accorded the same force and effect "given" to a statute validly enacted by Congress. *Farkas v. Texas Instruments, Inc.*, 375 F. 2d 629 (5th Cir. 1967), *Gnotta v. United States*, 415 F. 2d 1271, 1275 (8th Cir. 1969), *Farmer v. Philadelphia Electric Co.*, 329 F. 2d 3, 7 (3rd Cir. 1964).

The Court of Appeals adopts the position that the failure of the Executive Order to cite specific authority other than the "Constitution and the laws of the United States" was an incurable infirmity. Such an argument must fail for two reasons. This Court in *Youngstown Sheet and Tube v. Sawyer*, 343 U. S. 597, 585 (1952), stated:

> "The President's power, if any, to issue the (executive) order must stem either from an act of Congress or from the Constitution itself."

Article II, Section 3 of the Constitution provides the President with sufficient support to issue the Executive Order. The Court of Appeals' holding that the Constitution alone is not sufficient to support the issuance of the

Executive Order is contrary to this Court's position in *Youngstown Sheet and Tube, supra.*

In addition, two statutes enacted by Congress are advanced as providing the legislative basis for the Executive Order, to-wit, the Agricultural Marketing Act of 1946, 7 U. S. C. § 1621, et seq., and the Wage and Price Stability Act, 12 U. S. C. § 1904 (Supp. 1975). Each of these statutory enactments provides a foundation for the Executive Order.

The thrust of the Secretary's argument and the net effect of the Court of Appeals decision is that the Secretary can disregard an Executive Order which fails to specifically state its tie to an act of Congress or provision of the Constitution. This Court should address itself to the question of whether or not this gives administrative agencies of the executive branch of government a license to avoid orders of the President which directly relate to the good of the citizens of this country. It is interesting to note that during and after the promulgation of the Revisions, the Secretary acted, although ineffectively and tardily, in such a way as to clearly indicate his belief that the Executive Order was law and required his compliance. It is only after his failure to comply that he contends he was not bound.

Perhaps more important for this Court's consideration as a basis for granting a writ of certiorari is the Court of Appeals position that private litigants lack standing to enforce Executive Orders of the President of the United States against various agencies of the executive branch. It is the belief of Petitioner that this Court has not directly addressed itself to this issue.

This Court has indicated in *Association of Data Processing v. Camp,* 397 U.S. 150 (1970), *Barlow v. Collins,* 397 U.S. 159 (1970), and *United States v. Students Challenging Regulatory Agency Procedure (SCRAP)*, 412 U.S. 669 (1973), the requirements for standing. Petitioners urge that as a group or separate they are well within the zone of interests to be protected by the Executive Order. Petitioners are the links in the chain of beef marketing which feed the animal prior to slaughter, which prepare the muscle for the consumer, and which directly serves the consumer at eating establishments both small and large throughout the United States. It should be noted that the remaining plaintiffs in this action are filing separate petitions and that collectively they add the packer and ultimate consumer to those opposed to the Secretary's actions.

The interest to be protected by the Executive Order is that of citizens generally to be free from government action which contributes directly to the inflation which many regard as the number one problem in this country. Simply put, the Secretary failed to consider the inflationary consequences of his action in order to benefit one segment of the industry, the producer, and this Court should comment on whether it is appropriate for him to be able to do so in violation of the Executive Order. As the Court of Appeals for the District of Columbia held in *Environmental Defense Fund, Incorporated v. Hardin,* 428 F. 2d 1093 (D. C. Cir. 1970):

> "Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit." 428 F. 2d at 1097.

This Court and other Courts of Appeals have clearly established that an executive order, validly enacted pursuant to Constitutional or Congressional mandate carries with it the force and effect of law; and that private individuals within the "zone of interests" have the requisite standing to seek judicial review of a governmental agency's failure to obey the mandate of an executive order. Certiorari should be granted in this case so that this Court may review the contrary conclusions of the Court of Appeals.

III.

This Court should grant a writ of certiorari to review the Court of Appeals' holding that petitioners while seeking no additional relief, could not rely upon other grounds to support the decision of the District Court due to their failure to cross-appeal.

This decision of the Court of Appeals is contrary to a long line of decisions by this Court, as well as cases in the Court of Appeals itself.

United States v. American Ry. Express Co., 265 U. S. 425, 434 (1942); *Anderson v. Atherton*, 302 U. S. 643 (1937); *Jaffke v. Dunham*, 352 U. S. 280, 281 (1956). This Court stated in *Jaffke*, *supra*:

> "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." 352 U. S. at 281.

The citation by the Court of Appeals to *Tiedman v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 513 F. 2d 1267, 1272 (8th Cir. 1975), supports rather than contra-

dicts the numerous holdings of this Court that a cross-appeal is not necessary when a party is seeking to support the judgment below.

The Court of Appeals held as "inapposite" this Court's finding in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281 (1974), that despite a finding of substantial evidence a trial court may still find the action of the agency to be arbitrary and capricious. The clear implication of the Court of Appeals' holding relative to the question of the responsibility of the prevailing party on appeal is that unless that party cross-appeals as to any finding by the lower court, he is in jeopardy of having all evidence which might support the lower court's decision disregarded or as in this case, never considered by the appellate court.

In the instant case, the evidence showing that the Secretary acted in an arbitrary and capricious manner and in abuse of his discretion both within and outside the administrative record is abundant, some of which is as follows:

1. The entire thrust of the studies relied on by the Secretary was based on the proposition that the implementation of the Revisions would result in the consumer being able to purchase beef, though of a lesser quality, at a lower price than he or she does so today. That is to say, that with the lowering of the choice grade to include meat that is now graded good, the producer would profit on the savings gained by feeding the animals less grain and that savings would be passed on to the consumer. There is not one shred of evidence to support this view

in the administrative record. Furthermore, a similar lowering of the quality grade in 1965 did not result in a lowering of the price to the consumer.

2. There is no evidence within or without the administrative record to support the finding by the Court of Appeals that mandatory yield grading would result in the signaling to the producer of the kind of beef demanded by the consumer. In fact, the evidence adduced at the hearing shows the exact opposite to be the fact.

3. The administrative record clearly shows that the Secretary tampered with the comments taken during the comment period to water-down the overwhelming opposition of the consumers to the Revisions.

4. The evidence introduced at the District Court hearing clearly shows that the impetus behind the Revisions was due to the involvement and efforts of ANCA and designed to singularly benefit the producer at the expense of the marketing system and the ultimate consumer.

Finally, the Court of Appeals, in its opinion, failed to mention the finding of the District Court that:

> "In conclusion, the Court finds instances wherein the action of the United States Department of Agriculture, in promulgating revisions to rules found at 7 C. F. R. Sec. 53.102, 53.104, 53.105 and 53.203 to 53.206, was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law', entitling plaintiffs to injunctive relief pursuant to 5 U. S. C. Sec. 706(2)(A). See, generally, *CPC International v. Train*, — F. 2d —; Nos. 74-1447, 1448, 1449 (8th Cir., May 5, 1975)." 395 F. Supp. 923, 933.

The petitioners respectfully submit that in disregarding the finding by the District Court that the Secretary acted in an aribtrary and capricious manner in promulgation of the Revisions as they relate to the lowering of the quality grading, the Court of Appeals acted contrary to the established law of this Court.

CONCLUSION

For the reasons aforesaid, petitioners pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

NATIONAL ASSOCIATION OF MEAT PURVEYORS, and NATIONAL RESTAURANT ASSOCIATION,
Petitioners

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Dated: January 9, 1976

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Respondents.

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APPENDICES A, B, C AND D

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

INDEPENDENT MEAT PACKERS ASSOCIATION, an unincorporated association,

Plaintiff,

NATIONAL ASSOCIATION OF MEAT PURVEYORS, an unincorporated association,

Plaintiff-Intervenor,

NATIONAL LIVESTOCK FEEDERS ASSOCIATION,

Plaintiff-Intervenor,

NATIONAL RESTAURANT ASSOCIATION,

Plaintiff-Intervenor,

CONSUMER FEDERATION OF AMERICA, NATIONAL CONSUMERS LEAGUE, AMERICANS FOR DEMOCRATIC ACTION, CONSUMER AFFAIRS COMMITTEE, NATIONAL CONSUMERS CONGRESS, PUBLIC CITIZEN, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA (AFL-CIO), SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO), AMERICAN FEDERATION OF TEACHERS (AFL-CIO),

Plaintiff-Intervenors,

vs

EARL L. BUTZ, individually and in his capacity as United

CIVIL NO. 75-0-105

MEMORANDUM

BLEED THROUGH

States Secretary of Agriculture;
ERWIN L. PETERSON, individually
and in his capacity as Admin-
istrator of the United States
Department of Agriculture; and
ANDREW ROT, individually and
in his capacity as Supervisor
of the Meat Grading Branch
of the United States Depart-
ment of Agriculture at Omaha,
Nebraska,

Defendants,

AMERICAN NATIONAL CATTLEMEN'S
ASSOCIATION, a corporation,

Defendants-Intervenor.

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DENNEY, District Judge

This matter comes before the Court for decision subsequent to a hearing held from May 12, 1975 to May 23, 1975. Jurisdiction is founded under 7 U.S.C. § 1621 *et seq.*, 28 U.S.C. § 1331, 5 U.S.C. §§ 702 and 706, and 28 U.S.C. § 1337.

In this action, filed April 1, 1975, plaintiffs seek declaratory and injunctive relief from the promulgation and enforcement of Department of Agriculture rules revising the grading standards for beef. After a hearing on plaintiff's motion for a preliminary injunction, the Court, on April 11, 1975, granted interlocutory relief for the reasons stated in the Court's Memorandum dated April 11, 1975. The order granting the preliminary injunction was appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed on April 15, 1975, but instructed this Court to conduct:

> . . . a plenary hearing on the request for a permanent injunction and that a final decision of the District Court be rendered within 45 days of this order . . . .

In addition, the Eighth Circuit Court of Appeals instructed this Court to reexamine the adequacy of the bond pursuant to F.R.Civ. P. 65. Thereafter, on April 18, 1975, this Court conducted a hearing on the adequacy of the bond and it was ordered increased from $5,000 to $10,000, due to the high costs of "dialy copy" and the likelihood of an expedited appeal.

Since these early proceedings, the Court has permitted four groups to intervene as plaintiffs, and one group

to intervene as a defendant. No other motions to intervene were filed, although the Court is aware of actions subsequently filed in other Federal District Courts alleging the same general cause of action.

In accordance with F.R.Civ.P. 52, the Court makes the following findings of fact:

1. Grade standards for beef were originally promulgated in 1926, in which marbling (the size and disperson of flecks of fat within the meat) was recognized as a major factor in evaluating quality. The first major revision of the grades in 1939 established physiological maturity as an important additional factor in evaluating quality. As a very general rule, increases in marbling have a beneficial effect on quality, while increases in maturity have a deleterious effect on quality. Eight grades are currently used to identify these quality differences – prime, choice, good, standard, commercial, utility, cutter and canner. Uniform palatability (a measure of the tenderness, juiciness and flavor) is the goal of quality grading. In 1965, an additional method of grading was added to identify carcasses and wholesale cuts for their relative yield of retail cuts. This method is called yield grading and consists of five numerical grades (1 through 5), with 1 indicating beef that will yield a high percenage of retail cuts (e.g., lean cattle having minimal fat deposits).

2. Both quality and yield grading have been optional. For example, a packing house could have some of its carcasses quality graded, others yield graded, and yet others both quality and yield graded. At present, approximately 40% of slaughtered cattle are quality graded. Of these,

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approximately 70% fall in the choice category, 7-8% fall in the prime cateogry, and 22% fall within the good grade. Although the standards for the lower grades (standard, commercial, etc.) are used in the industry as guidelines, very few such carcasses are officially graded due to the expense of grading. Of cattle that are quality graded, approximately 50% are also yield graded.

3. On September 11, 1974, the Agricultural Marketing Service of the United States Department of Agriculture published a notice and draft of revisions to the grades. 7 C.F.R. §§53.100-53.105; 7 C.F.R. §§53.201-53.206, 39 Fed. Reg. 32743 (Sept. 11, 1974).

4. The proposed rules differed from the old rules in several aspects.

a. Conformation (the shape of the carcass as compared to an ideal shape) was eliminated as a factor in determining quality grade.

b. When officially graded, all carcasses would be identified for both quality grade and yield grade (except for bull carcasses, which are insignificant in number).

c. In the "A maturity" range (young cattle from 9 to 30 months old in age), maturity was eliminated as a factor in determining quality grade. The marbling requirements in the A matuirty range were set at the loweset level of marbling previously acceptable within the particular grade.

d. In the "B maturity" range (older cattle from 32 to 48 months old in age), the marbling

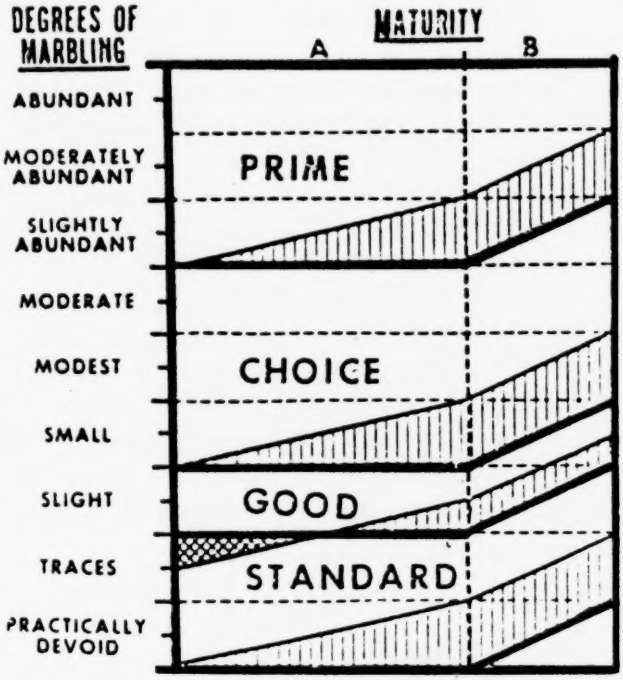
requirements were reduced one full "degree of marbling" for prime and choice.

Item "c" above is of particular importance, as it involves two decisions. The elimination of maturity as a factor implies that the old formula was in error. Under the old standards, as the maturity increased, the palatability increased. The bottom line of a grade should, of course, indicate uniform palatability along the line. Once the Department decided to correct the bottom lines of the grades within the A maturity range, it was faced with a second decision: whether to set the new standard at the lowest palatability acceptable under the old standards, to set the new standard at the higher palatability required of the more mature cattle in the "A" range, or to set the new standard somewhere in between. The department chose to set the new standard at the lowest palatability previously acceptable in that grade. Thus, under the new standards, the consumer will receive "choice" graded meat having a palatability no worse than the minimum palatability possible under the old standards for "choice."

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PROPOSED CHANGES IN THE RELATIONSHIP BETWEEN MARBLING, MATURITY, AND QUALITY GRADE



5. The Court has examined the following references cited by the Department in the Statement of Considerations preceding the rules 40 Fed.Reg. 11535:

a. Berry *et al.* (J. Animal Science 38:507)

b. Romans *et al.*, (J. Animal Science 24:681)

c. Breidenstein, (J. Animal Science 27:1532)

d. McBee and Wiles, (J. Animal Science 26:701)

e. Covington *et al.* (J. Animal Science 30:191)

f. Norris *et al.* (J. Food Science 36:440)

These references convince the Court that the Department had substantial evidence upon which to decide to change the maturity-marbling relationship, and to fix that change at the levels reflected in the new rules.

6. The comments received by the Department were very extensive, and in the light most favorable to the defendants were as follows:

a. Approximately 40% of the comments opposed the change in the marbling-maturity requirements.

b. Approximately 25% of the comments opposed the requirement of compulsory yield grading.

c. There was no significant opposition to the elimination of conformation as a factor in quality grading.

7. Executive Order Number 11821, 39 Fed. Reg. 41501, was signed on November 27, 1974.

8. During the earlier proceedings in this Court, all parties represented that Exhibit B to Defendants' Objections

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to Issuance of a Preliminary Injunction (Filing No. 4) was the inflationary impact statement required by Executive Order 11821. In the Court's prior Memorandum, the Court stated its doubt that this document was sufficient. The Court has been subsequently informed that counsels' assertion was in error. The Eighth Circuit Court of Appeals was apparently also misinformed on this fact. The Court recognizes that counsels' error was unintentional and no doubt caused by the speed at which this lawsuit progressed. By way of clarification, there are three documents of interest:

a. An "inflation impact evaluation" which is prepared by the agency before taking "major" action.

b. A "summary" of the inflation impact statement which is prepared by the agency and forwarded to the Office of Management and Budget (See Exhibit No. 6, ¶ 5(d)).

c. A "certification" that the inflationary impact has been studied, which must accompany the rules. In this case, the certification was included at the end of the rules as promulgated, 40 F.R. 11535.

The "summary" required in (b) above is Exhibit No. 901, a letter from E.L. Peterson (Administrator, Agricultural Marketing Service) to Don Paarlberg (Director Agricultural Economics) which was received by Mr. Paarlberg on March 6, 1975, and forwarded to the Council on Wage Price Stability. This was the document the Court thought was the impact statement itself.

The Court has not been presented with the "evaluation" itself. However, Exhibit No. 901 contains the following statement:

> An analysis of the economic impact of the grade change proposal was made by the Commodity Economics Division, Economic Research Service. While the primary thrust of the study was not directed at assessing the inflationary impact of the proposal, its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. Principal inflation-related findings, as reported in a December 1974 Supplement to the Livestock and Meat Situation Report (Exhibit No. 3) included: . . .

9. Executive Order 11821 requires a consideration of the following inflation related factors:

a. Cost impact on consumers, businesses, markets, or Federal, State or Local Government.

b. Effect on productivity of wage earners, businesses or governments at any level.

c. Effect on competition.

d. Effect on supplies of important products or services.

Circular No. A-107 (Exhibit No. 6) implementing the executive order, required the appointment of a "compliance officer"; such was not done until March 18, 1975. The Court does not view this delay as substantive, but the fact that a compliance officer was not appointed until after the final promulgation of the rules on March 12,

1975, indicates a serious disregard of the requirements of the executive order.

10. Exhibit No. 3, contains an analysis of the following pertinent factors:

a. The potential of compulsory yield grading to improve pricing accuracy.

b. The probable lowering of price to the consumer of choice grade meat if the supply thereof should "increase dramatically."

c. That retailers will probably have to adjust their buying practices – especially if they had been marketing ungraded "good" meat under a house brand.

d. That packers may find it necessary to be more selective in their buying practices to account for the premium placed on yield grades.

e. That feeders can expect to "feed to choice" in fewer days.

f. That beef production will increase in efficiency.

g. That cattle will be marketed at lower weights, necessitating more cattle to meet demand.

h. That the feed needs of the extra cattle described above would be supplied by the feed saved by feeding for fewer days.

11. Under the old regulations, quality grading was done by official United States Department of Agriculture Graders.

For this service, the packing house was charged $14.60/ hour. The graders grade approximately 70 carcasses per hour – thus the cost of grading a carcass is approximately $.20 for a typical 600 pound carcass; quality grading costs $.033¢ per pound. This cost reflects only the U.S.D.A. fees for the quality grading. In addition to these fees, the packinghouse must employ a "rollerman" who applies the stamps under the direction and control of the official grader. The rollerman is not employed by the U.S.D.A.; rather, he is furnished by the packinghouse to assist the official grader and thereby reduce the time (and fees charged) for the grading. Rollermen typically earn approximately $5.00/hour.

The Court finds that the plaintiffs' grading costs will roughly double under the new regulations. Other packers will experience higher costs, the exact amount depending on the proportion of their output that has been yield graded under the old regulations. While the price per pound is relatively insignificant, the high volume of meat processed results in a significant cost to the packer. (See Exhibit No. 21).

12. Under the old regulations, quality grade marks were hand stamped on the carcass in four locations. Each grader used a stamp which included his initials. To indicate "good" the grader would place one stamp in each of the four locations. "Choice" was indicated by two hand stamps in each of the four locations. Likewise, "prime" required three stamps in each of the four locations. Once the grader had stamped the carcass, the rollerman would apply the rollermarks to each side of the carcass. The yield grade was hand stamped in four locations on the carcass.

Under the new regulations, there are two methods of grading, the first of which is intended for packing plants

using a "rail" (an overhead rail from which the carcasses are hung and moved manually to work stations). This method requires that the grader hand stamp for quality in two locations and for yield grade in ten locations. The rollermarkings are applied in the usual manner and indicate only the quality grade.

The second method under the new regulations is designed for packing plants using a "chain" (similar to a "rail", but where the carcasses are moved automatically to the workstations). The grader hand stamps for quality in two locations, and for yield in two locations. This method uses a rollermark containing both quality and yield marks. (See Exhibits No. 902-905).

Under the old regulations, it was mandatory to rollermark the brisket, while under the new regulations that is optional.

13. The Court finds that the plaintiffs will suffer more than Ten Thousand Dollars ($10,000.00) in increased costs, due to increased grading expense, exclusive of interest and costs, should the regulations in question become effective. (See Exhibit No. 21).

14. There is evidence before the Court, although not in the administrative record, that consumer preference closely parallels "palatability", as that term is defined by the Department. All of the Department's research was in terms of "palatability" (as determined by trained taste panels and various mechanical tests for shear forces and the like) – *there was no recent research relating to what actual consumers desire.* In sum, the Department hypothesized a consumer whose only desire was palatability – and then tested for palatability. While this is not a totally

unreasonable assumption, the Court finds no evidence in support, save Exhibit No. 25, a test conducted in 1961.

15. Several cities require that all meat sold at the retail level be quality graded. One such city is Chicago, where a significant proportion of the plaintiffs' output is sold.

16. Although not in the administrative record, the Court was presented with evidence derived from U.S.D.A. publications to the effect that there was a slight increase in retail price following the change in the regulations in June, 1965. In addition, the same data shows a substantial increase in the proportion of meat falling in the "choice" grade. The 1965 changes in marbling maturity relationship were similar in direction and degree to the proposed regulations in issue in this case. The Court does not give this evidence great weight, due to the complex economic factors which determine retail meat prices. *There is, however, no evidence in the administrative record indicating a factual basis for the Department's conclusion that prices would drop at the retail level.* The Supplement to the Livestock and Meat Situation (December 1974), Exhibit No. 3, concluded that:

> The consumer could be indirectly affected by a lower relative price of choice if the supply of choice should increase dramatically due to the change, and by lower prices in general if efficiency of the industry is improved.

The Court finds this conclusion deserving of little weight, as it is based on meager facts, simplistic economic reasoning, and is contradicted by the past experience of the 1965 changes.

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17. Immediately after a head of cattle is killed and the hide removed, it is inspected for health and sanitation purposes; *see*, 21 U.S.C. §601 *et seq.* At this time, the inspector, a U.S.D.A. official, often requires that grubs and bruises be cut out of the exterior fat covering. If more than a minor amount of fat is removed, yield grading is not permitted, as the fat thickness is an important factor in the yield grade equation. For reference, that equation is:

$Y = 2.5 + 2.5T + .2P + .0038W - .32A$

where

Y = Yield Grade (Decimal digits dropped, not rounded - e.g. 2.9 becomes 2)

T = Adjusted thickness of fat over ribeye (inches)

P = Percent kidney, pelvic and heart fat

W = Hot carcass weight (lbs.)

A = Area of ribeye (square inches)

Under the old regulations, even if extensive amounts of fat were trimmed, the carcass was eligible for quality grading. The new regulations prohibit any grading in such a situation.

Some packers customarily trim fat while the carcass is on the kill floor. This trimming involves at most 10 lbs/head and is done to improve the appearance of the carcass.

18. Cattle feeders customarily sell to packinghouses on a "live weight basis", meaning that a buyer examines the live cattle and agrees to pay a certain price per pound of live weight. Occasionally, cattle are sold on a "grade and yield basis", whereby the purchase price is dependent on the quality and yield grades of the carcass, as determined after the cattle is slaughtered and dressed. *There is no*

evidence in the administrative record, or otherwise, that the practice of selling on a live weight basis will change.

19. Cattle buyers are adept at assessing the yield grade of live cattle, and consider yield grades when arriving at an average price per pound (live weight basis) of a pen of cattle.

20. For carcasses of the same quality grade, there is a price spread between carcasses having different yield grades. This price spread varies, depending on market conditions, and the exact figures are published on a daily basis in readily available market newsletters and the like. (See Exhibit No. 31).

21. *There is no evidence which directly, or by inference, tends to show that consumer preferences will be reflected back through marketing channels to producers to a greater extent* under the new regulations.

CONCLUSIONS OF LAW

In accordance with F.R.Civ.P. 52(a), the Court makes the following conclusions of law. Before the trial of this case, motions for summary judgment were made by Consumer Federation of America, *et al.* (Filing No. 54); Earl L. Butz, *et al.*, (Filing No. 57); American National Cattlemens Association (Filing No. 59); and the Independent Meat Packers (Filing No. 69). These motions were taken under advisement due to the 45 day limitation imposed on this Court. The decision herein will dispose of the issues raised in the several motions.

The Court finds that it has jurisdiction to hear this matter pursuant to 5 U.S.C. §702, 28 U.S.C. §1331, and

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28 U.S.C. §1337. See *Stark v. Wickard*, 321 U.S. 288, 290 (1944). Plaintiffs have adequately alleged "standing" within the teachings of *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973).

Compulsory Yield Grading

The first substantive issue for consideration pursuant to 5 U.S.C. §706(2)(A), is whether "compulsory yield grading" falls within the authority delegated by Congress. 7 U.S.C. §1622(h) states as follows:

> (The Secretary of Agriculture is directed and authorized) . . . to inspect, certify, and identify the class, quality, quantity and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, *except that no person shall be required to use the service authorized by this subsection* . . . . (Emphasis added).

The defendants contend that "the service" means the collection of all grading standards authorized by this subsection. They conclude that Section 1622(h) permits a regulation requiring that all quality graded meat be also yield graded, and vice-versa. Both the wording of the statute and its legislative history are unclear. When this section

was debated, Congress apparently did not anticipate the possibility of grading for yield. See 46 U.S. Code Cong. Service 1584 (1946); 92 Cong. Rec. 9022-9033 (July 15, 1946).

The Department of Agriculture's own construction of Section 1622(h) is as follows:

> 7 C.F.R. §53.1(p): *Grading Service.* The service established and conducted under the regulations for the determination and certification or other identification of the class grade or other quality of livestock or products under standards.
>
> 7 C.F.R. §53.4: *Kind of Service.* Grading service under the regulations shall consist of the determination and certification and other identification, upon request by the applicant, for the class, grade, or other quality of livestock or products under applicable standards . . . .

Under U.S.D.A. definitions, both the quality and yield standards are considered as measures of "quality". See 7 C.F.R. §53.1(nn) and (mm). Yield grade, which measures the relative proportion of the weight of trimmed retail cuts to the weight of the carcass is more properly a measure of "quantity." Although the Court is aware of the Secretary's definitions to the contrary, and the proper weight to be accorded that definition, the Court finds the Secretary's construction unfounded. The defendants, in their brief, concur in the Court's determination that yield grading is a measure of quantity.

Against this background, the exception in Section 1622 (h) takes on a new light. Essentially, the Department has

placed a precondition on the right to refuse either yield grading or quality grading. Defendants contend that the use of the phrase "the service authorized by this subsection" encompass all possible grading services – that the Department is permitted to "bundle" the services together and require that an applicant take or refuse the entire "bundle". The Court finds this construction of Section 1622(h) erroneous when considered in light of the Department's own definitional regulations, and the voluntary tone of Section 1622. In addition, the Court finds no necessity for compulsory yield grading, as a substantial proportion of all meat is yield graded under the old regulations and no appreciable benefit will result from compulsion. (See Findings No. 18-21).

The Court recognizes that there exists an economic compulsion to have choice grade meat graded as such – the certification as "choice" increases the value of the meat. This form of compulsion is not forbidden by Section 1622(h), and is the type of compulsion that makes a voluntary system viable. It is the tying of yield grade to quality grade which the Court finds in excess of statutory authority.

For these reasons, the regulations relating to compulsory yield grading will be set aside pursuant to 5 U.S.C. §706 (2)(A).

Executive Order No. 11821

The second issue for consideration is the adequacy of the Department's actions relative to Executive Order No. 11821. As stated in *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, 585 (1952), "The President's power, if any, to issue the order must stem either from an act

of Congress or from the Constitution itself." In this regard, the Court has considered Article II, Section 3, of the United States Constitution, which states as follows:

> (The President) shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . (and) . . . he shall take Care that the Laws be faithfully executed . . . .

This section, by necessity, gives the President the power to gather information on the administration of executive agencies. The information and analysis required by Executive Order No. 11821 would also be helpful in recommending new legislation. The Court has, in addition, considered 7 U.S.C. §1621, the Congressional Declaration of Purpose of the Agricultural Marketing Act of 1946. That section states as follows:

> . . . In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed . . . with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner.

This section thus requires much the same analysis of costs and economics as required by the executive order. *Youngstown* is readily distinguishable, as that case involved the seizure of property for public use, an action of magnitude and one in conflict with constitutional principles respecting private property. Here, the executive order is supported by, and not in conflict with, constitutional language, and is within the Congressional purpose of the Agricultural Marketing Act of 1946.

The defendants contend that even if the executive order is valid, it is a mere "housekeeping" order, enforceable only by the President. The Court might be inclined to agree with the defendants' propositon, except for the previously stated Congressional purpose. That statutory directive, combined with the substantive nature of the executive order, convinces the Court that the Order is more than a housekeeping order and falls within the judicial review contemplated by 5 U.S.C. §706. *See, e.g., Letter Carriers v. Austin,* 418 U.S. 264 (1974); *Brookhaven Housing Coalition v. Kunzig,* 341 F.Supp. 1026 (E.D. N.Y. 1972).

There is no doubt that the Department's analysis of the inflationary impact did not consider the effect of the new regulations on:

(a) The productivity of wage earners

(b) Competition

(c) Employment

(d) Energy resources

(e) Secondary markets (e.g. grain)

In addition, the Department did not weigh the inflationary impact of the alternative proposals submitted by consumers and others. Nor was there a quantification of those factors the Department did consider. While the Court recognizes that prognostication of inflation is subject to inaccuracies and is at best a difficult task, the Department's conduct falls woefully short of that required by law. In the summary of its analysis, the Department indicated the nature and inadequacies of the analysis with the following language:

> While the primary thrust of the study was not directed at assessing the inflationary impact of the proposal, its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. (See Exhibit No. 901).

These facts convince the Court that there was a material and substantial noncompliance with the mandate of Executive Order No. 11821, and that the proposed regulations should be set aside pursuant to 5 U.S.C. §706(2)(A).

CONCLUSION

In conclusion, the Court finds instances wherein the action of the United States Department of Agriculture, in promulgating revisions to rules found at 7 C.F.R. §§53.102, 53.104, 53.105 and 53.203 to 53.206, was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law", entitling plaintiffs to injunctive relief pursuant to 5 U.S.C. §706(2)(A). See, generally, *CPC International v. Train*, ___ F.2d ___ ; Nos. 74-1447, 1448, 1449; (8 Cir. May 5, 1975).

Although much of this decision rests on uncontroverted facts, there were material issues of fact precluding summary judgment. In addition, the Court required expert testimony to fully understand the content and scope of the proposed regulations.

For these reasons, plaintiffs' prayer for permanent injunctive relief will be granted, and the previously listed motions for summary judgment will be denied by separate order of the Court.

Dated this 29th day of May, 1975.

[Filed May 29, 1975]

* * * * *

ORDER

In accordance with the findings of fact and conclusions of law stated in the Court's Memorandum filed contemporaneously herewith:

IT IS THEREFORE ORDERED that all motions for summary judgment (Filings No. 54, 57, 59 and 69) are denied.

IT IS FURTHER ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and their successors in office, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from giving force and effect to rules and regulations found in Volume 40, Page 11535, et seq., of the Federal Register, published on March 12, 1975, relating to a revision of the official standards for grades of carcass beef and

the related standards for grades of slaughter cattle (revisions to 7 C.F.R. §§53.102, 53.104, 53.105 and 53.203 to 53.206), and that the preliminary injunction entered by the Court on April 11, 1975 (Filing No. 5), is hereby made permanent.

Dated this 29th day of May, 1975.

BY THE COURT

/s/ Robert V. Denney

Robert V. Denney
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1486

Independent Meat Packers Association, et al.,
Appellees,

v.

Earl L. Butz, Secretary of Agriculture, et al.,
Appellants.

No. 75-1541

Independent Meat Packers Association, et al.,
Appellees,

v.

American National Cattlemen's Association, etc.,
Appellants.

Appeals from the United States District Court for the District of Nebraska.

Submitted: September 11, 1975
Filed: November 14, 1975

Before MATTHES, Senior Circuit Judge, HEANEY and STEPHENSON, Circuit Judges.

MATTHES, Senior Circuit Judge.

These are appeals from an order of the district court* permanently enjoining the implementation and enforcement of regulations promulgated by the United States Department of Agriculture (USDA) pursuant to § 203 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622.** The regulations revise offficial USDA standards for the grades of carcass beef, 7 C.F.R. §§ 53.102, 53.104-.105 (1975), and related standards for the grades of slaughter cattle, 7 C.F.R. §§ 53.203-.206 (1975). Appellee Independent Meat Packers Association (Packers) initiated this action on April 1, 1975 by filing a complaint seeking declaratory and injunctive relief from that part of the revised regulations providing that beef carcasses submitted for quality grading would be automatically graded for yield; in the alternative, the Packers sought declaratory and injunctive relief from the regulations in their entirety. The named defendants were Earl L. Butz, Secretary of Agriculture, Erwin L. Peterson, Administrator of the Agricultural Marketing Service, USDA, and Andrew Rot, Supervisor of the USDA Meat Grading Branch at Omaha, Nebraska (federal defendants). The Packers claimed that the compulsory yield provision of the new regulations,[1] which were to have taken effect on April 14, 1975, was arbitrary, capricious, "not

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* The Honorable Robert V. Denney.

** The Secretary and other original defendants appealled on July 2, 1975 (No. 75-1486). American National Cattlemen's Association, intervening defendant, *see* page 3, *infra*, appealed on July 23, 1975 (No. 75-1541).

[1] 40 Fed. Reg. 49 (1974).

supported by substantial evidence," and "in excess of the power" of the USDA. They further alleged that the revised regulations were issued in violation of Executive Order No. 11821, which requires an evaluation of the inflationary impact of all major legislative proposals, rules, and regulations emanating from the executive branch.[2] The complaint alleged jurisdiction under 28 U.S.C. §§1331, 1337 and 5 U.S.C. §§702, 706.

After a hearing on the application for a preliminary injunction, the district court, being persuaded that there was a reasonable likelihood of success, issued a preliminary injunction on April 11 enjoining implementation of the revised regulations in their entirety upon the posting of a $5,000 bond.[3] The federal defendants then appealed to this court, which affirmed the district court's order granting the preliminary injunction, but remanded the cause for "a plenary hearing on the request for a permanent injunction" and an expedited decision. *Independent Meat Packers Ass'n v. Butz*, 514 F.2d 1119, 1120 (8th Cir. 1975) (per curiam). The district court subsequently permitted the American National Cattlemen's Association (ANCA) to intervene as a party-defendant and four groups, the Purveyors, Feeders, Restaurants, and Consumers, to intervene as party-

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[2] Executive Order No. 11821 also directs the Director of the Office of Management and Budget to develop criteria for the identification of major legislative proposals, rules, and regulations having a significant impact upon inflation and to prescribe procedures for their evaluation. Pursuant to this mandate, the Office of Management and Budget on January 28, 1975 sent Circular No. A-107, which prescribes guidelines for compliance with the Order, to the heads of all executive departments.

[3] The bond was subsequently ordered increased to $10,000.

plaintiffs.[4] The allegations of plaintiff-intervenors were substantially the same, except that the Consumers contested principally the new standards for identifying beef quality.

Prior to trial the Packers, Consumers, and all defendants filed motions for summary judgment. The federal defendants also moved for an order limiting the scope of the court's inquiry to a review of the administrative record.[5] After a full trial,[6] the district court on May 29, 1975, filed a memorandum opinion incorporating its findings of fact and conclusions of law and an order denying all motions for summary judgment and permanently enjoining enforcement of the revised regulations. *Independent Meat Packers Ass'n v. Butz*, 395 F. Supp. 923 (D.Neb. 1975).

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[4] The Purveyors, Feeders, and Restaurants were represented by the National Association of Meat Purveyors, National Livestock Feeders Association, and the National Restaurant Association. The Consumers were represented by the Consumer Federation of America, the National Consumers League, Americans for Democratic Action, Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO), and the American Federation of Teachers (AFL-CIO).

[5] The court never formally ruled on the government's motion. When the federal defendants argued their motion for summary judgment, however, they retierated their request, which was orally denied from the bench. Tr., vol. 1, at 40-41.

[6] The ten-day trial generated seventeen volumes of testimony and several hundred exhibits.

I.

Resolution of the issues raised in this appeal requires a brief review of the history of the beef grading program currently in force. The USDA inaugurated its voluntary beef grading program in May 1927 without express congressional authorization.[7] To promote a scientific approach to the problems of marketing, transporting and distributing agricultural products,[8] Congress in 1946 passed the Agricultural Marketing Act. Under § 203 of the Act, 7 U.S.C. § 1622(h), the Secretary of Agriculture is authorized to "inspect, certify, and identify the class, quality, quantity, and condition of agricultural products . . . , under such rules and regulations as [he] may prescribe...."[9] Under the beef grading regulations presently in force, 7 C.F.R. §§53.100 *et seq.*, the USDA grades been carcasses on a voluntary fee-for-service basis. Federal graders evaluate beef carcasses for their quality grade and yield grade, but packers may request either one or both of these services. 7 C.F.R. § 53.102(a). The quality grading system presently in effect combines both quantitative and qualitative factors, which are combined to form a final grade. Eight quality grade designations – Prime, Choice, Good,

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[7] United States Department of Agriculture, Agriculture Marketing Service, *Official United States Standards for Grades of Carcass Beef* 2 (1973).

[8] *See* 1946 U.S. Code Cong. Service 1586.

[9] The Secretary is authorized to promulgate regulations "to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no personal shall be required to use [this] service..." 7 U.S.C. §1622(h).

BLEED THROUGH

Standard, Commercial, Utility, Cutter, and Canner – are applicable to steer and heifer carcasses. The degree of marbling of intramuscular fat[10] and the physiological maturity[11] of the slaughtered cattle are the palatability – indicating characteristics of the beef. Conformation involves the proportion of meat to bone and of high to low value cuts.[12] To some extent, increased marbling compensates for greater physiological maturity, 7 C.F.R. § 53.102(r), and superior conformation compensates for marbling except in the Prime, Choice, and Commercial grades, 7 C.F.R. § 53.102(s).

The yield grade of a beef carcass is determined by considering four factors: the thickness of the external fat, the amount of kidney, pelvic, and heart fat; the area of the ribeye; and the hot carcass weight. 7 C.F.R. § 53.102 (u).[13] USDA yield grade designation represents the percentage of the carcass weight that is made up of boneless,

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[10] The degrees of marbling in the order of descending quantity are as follows: abundant, moderately abundant, slightly abundant, moderate, modest, small, slight, traces, and practically devoid. 7 C.F.R. § 53.102(g).

[11] The five maturity groups are identified as A, B, C, D, and E, in order of increasing maturity. *Id.*

[12] Superior conformation, which is generally reflected in a carcass with a full, well-rounded appearance, means that there is a high proportion of meat to bone and a high proportion of weight in the more valuable parts of the carcass. 7 C.F.R. § 53.115(b)(2).

[13] The USDA yield grade is determined on the basis of the following equation: yield grade – 2.50 + (2.50 x adjusted fat thickness, inches) + (0.20 x percent kidney, pelvic, and heart fat) + (0.0038 x hot carcass weight, pounds) – (0.32 x area ribeye, square

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closely trimmed retail cuts from the round, loin, rib, and chuck.[14] When the USDA introduced yield grading on a voluntary basis in 1965, only 3-1/2 percent of beef submitted for quality grading was also yield graded. Under the voluntary program presently in force, approximately 70 percent is graded for yield.[15]

Acting under the rulemaking power vested in the Secretary of Agriculture by § 203 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622(h), the USDA followed the notice and comment procedure outlined by § 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c), in promulgating the challenged regulations. First, on September 11, 1974, the USDA filed notice in the Federal Register of proposed changes in standards for grades of carcass beef, 7 C.F.R. §§ 53.102, 53.104-.105, and the standard for slaughter cattle, 7 C.F.R. §§ 53.201-.206. Interested persons were given an opportunity to present written comments, views, and arguments during a ninety-date period

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[13] (continued)
inches). 7 C.F.R. § 53.103(a). Yield grades are designated by the numbers 1 through 5. A carcass typical of its yield provides approximately 2.3 percent more boneless retail cuts from the round, loin, rib, and chuck than the next lower (higher number) yield grade. U.S. Dep't of Agriculture, Economic Research Service, *Proposed Changes in the Relationship Between Marbling, Maturity, and Quality Grade* 3 (Supp. Livestock Meat Situation Dec. 1974).

[14] *See* Cross, *Equations for Estimating Boneless Retail Cut Yields from Beef Carcasses*, 37 J. Animal Science 1267 (1973).

[15] Approximately 55-60 percent of all beef produced is USDA graded for quality.

ending December 10, 1974.[16] Over 4,000 comments and five petitions containing 7,618 signatures were received from a wide cross-section of the public. After minor modifications, the final draft accompanied by a Statement of Considerations was published in the Federal Register on March 12, 1975 with an effective date of April 14, 1975. 40 Fed. Reg. 11535 (1975).

The revised regulations contained four major changes in the standards for grades of carcass beef. First, conformation was eliminated as a factor for determining quality grade. Secondly, all carcasses submitted for grading would be identified for both quality grade and yield grade. Thirdly, having determined that increasing physiological maturity does not affect palatability within the youngest maturity group (cattle nine through thirty months old), the marbling requirements for this group were set at the lowest level previously acceptable in the Prime, Choice, and Standard grades. For the more mature beef in these grades increased marbling is still required to compensate for advancing age, but the minimum degree of marbling required was lowered by one degree. Lastly, to make the Good grade more uniform and restrictive, the Secretary limited this grade to carcasses in the A and B maturity groups and raised the minimum degree of marbling required by one-half degree.

The changes in the relationship between marbling-maturity and quality grades were opposed by most consumers, representatives of restaurants, institutions, their suppliers, and some feeders. Their opposition was based on the

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[16] Although not required by the Administrative Procedure Act, the Department also conducted regional briefings in five cities.

belief that the changes would impair the palatability of Prime and Choice beef and that consumers would have to pay "Choice grade prices for Good grade beef." The requirement that all beef graded be graded for both quality and yield was opposed most strongly by meat packers. They voiced the belief that compulsory yield grading would increase grading costs,[17] impede their ability to market carcasses from which exterior fat had been trimmed, require a complete restructuring of their buying practices, and preclude the grading of certain carcasses. The packers also questioned the accuracy of the USDA yield grade equation, especially its subjective application by federal graders.

The cattlemen endorsed the objectives and principal provisions of the regulations. Their studies and experience convinced them that it would be possible to produce fed beef more economically, using less grain, and a shorter average period in the feed lot. Combining quality and yield grading would reward producers of high yielding beef with premium prices as it would tend to eliminate the use of averages in marketing cattle.

The district court's memorandum opinion, which was designed to provide the basis for the injunction entered on May 29, considered the major contentions voiced by the opposing groups. First, the court found "substantial evidence" to support the changes in the relationship between marbling-maturity and quality grade. 395 F. Supp. at 927. This disposed of the principal challenge of the consumer

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[17] The packers are billed $14.60 per hour for work performed by federal graders during the daytime. 7 C.F.R. § 53.29(a).

group plaintiffs. Secondly, the court held that "compulsory yield grading" falls outside the authority delegated to the Secretary of Agriculture by 7 U.S.C. § 1622(h). The court reasoned that the requirement that all beef submitted for grading be graded for both quality and yield is inconsistent with the voluntary tone of § 1622(h). *Id.* at 931. The court also stated that there was "no necessity for compulsory yield grading" and that "no appreciable benefit [would] result from compulsion." *Id.* Lastly, the court considered the adequacy of the Department's actions relative to Executive Order No. 11821. Being persuaded that the adequacy of compliance with the terms of the executive order was subject to judicial review, *id.* at 932, the court ruled that the Secretary's inflation impact statement was deficient and that, accordingly, the regulations should be set aside in their entirety.

II.

Inasmuch as the USDA's alleged failure to comply with the mandate of Executive Order No. 11821 was the broadest ground upon which the district court's order enjoining implementation of the new regulations was based, we shall consider this issue first. Executive Order No. 11821, 39 Fed. Reg. 41501 (1974), requires the Director of the Office of Management and Budget (OMB) to consider the following factors in developing criteria for identifying legislative proposals, rules, and regulations having potential impact upon inflation: cost impact on consumers, businesses, markets, and government; effect on productivity of wage earners, businesses, and government; effect on competition; and effect on supplies of important products or services. The implementing document, OMB Circular No. A-107,

also requires consideration of the effect on employment and energy supplies or demand. In accordance with Section 5(d) of the OMB circular, the Secretary certified that the Department had evaluated the inflationary impact of the proposed regulations. 40 Fed. Reg. 11535, 11546 (1975), and forwarded a brief summary of the evaluation to the Council on Wage and Price Stability. The district court found this evaluation to be deficient because it did not consider the effect of the new regulations on the productivity of wage earners, competition, employment, energy resources, and secondary markets, weigh the impact of the alternative proposals submitted, or quantify the factors that were considered. 395 F. Supp. at 932.

Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. *See Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n. 1 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 7 (3d Cir. 1964). Executive Order No. 11821, issued by the President on November 27, 1974, cites no specific source of authority other than the "Constitution and laws of the United States." The district court found that the Order was authorized by § 202 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621.[18] We disagree. The

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[18] Section 202 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621, reads in pertinent part as follows:

> The Congress declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to

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broad language of § 202 simply states the policy objectives of the Act. The district court additionally relied on article II, § 3 of the Constitution, which states that "[the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; . . . [and] he shall take Care that the Laws be faithfully executed . . ." This provision alone does not give the executive order the force and effect of law. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) completely refutes the claim that the President may act as a lawmaker in the absence of a delegation of authority or mandate from Congress. Appellees contend that the Order was authorized by § 3(a) of the Council on Wage and Price Stability Act, 12

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[18] (continued)
the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote . . . a scientific approach to the problems of marketing, transportation, and distribution of agricultural products . . . so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congres to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed . . . with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner.

U.S.C. § 1904,[19] which authorizes the President to establish a Council on Wage and Price Stability with the power to monitor the economy and to appraise the inflationary impact of federal programs and policies. We need not determine, however, what role Congress contemplated for the

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[19] The Wage and Price Stability Act, 12 U.S.C. § 1904 (Supp. 1975) reads in pertinent part as follows:

Section 3(a) The Council shall –

(1) review and analyze industrial capacity, demand, supply, and the effect of economic concentration and anti-competitive practices, and supply in various sectors of the economy, working with the industrial groups concerned and appropriate governmental agencies to encourage price restraint;

(2) work with labor and management in the various sectors of the economy having special economic problems, as well as with appropriate government agencies, to improve the structure of collective bargaining and the performance of those sectors in restraining prices;

(3) improve wage and price data bases for the various sectors of the economy to improve collective bargaining and encourage price restraint;

(4) conduct public hearings necessary to provide for public scrutiny of inflationary problems in various sectors of the economy;

(5) focus attention on the need to increase productivity in both the public and private sectors of the economy;

(6) monitor the economy as a whole by acquiring as appropriate, reports on wages, costs, productivity, prices, sales, profits, imports, and exports; and

(7) review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation.

President under the Act[20] because, in our view, Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action. *See Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) (per curiam); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965). Even if appellees could show that the Order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action.[21] *See Acevedo v. Nassau County*, 500 F.2d 1078, 1083-84 (2d Cir. 1974); *Kuhl v. Hampton*, *supra* at 342; *Farkas v. Texas Instrument, Inc.*, *supra* at 632-33; *Farmer v. Philadelphia Electric Co.*, *supra* at 9; *see also Gnotta v. United*

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[20] The language of the Act is silent with respect to the President's role other than his authority to appoint the members and chairman of the council. The brief legislative history suggests, however, that "[t]he provisions embodied in the . . . Act represent a license by the Congress to the President to exercise his influence to arrest the inflational spiral." 120 Cong. Rec. 15,245 (daily ed. Aug. 19, 1974) (remarks of Senator Tower). *See generally id.* at 15, 244-57, 15,261-62, 15,266-80, 15,283-87; *id.* at 8754-56 (daily ed. Aug. 20, 1974).

[21] We have grave doubts as to whether under Executive Order No. 11821 appellees have standing to judicially challenge the adequacy of the impact statement. Under the test enunciated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), appellees must allege that they have suffered an "injury in fact" and that they seek to protect an interest "arguably within the zone of interests to be practiced [sic] or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. Appellees fail to satisfy

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States, supra at 1275.[22] Executive Order No. 11821 does not expressly grant such a right. To infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.

In summary, we conclude that the President did not undertake or intend to create any role for the judiciary in the implementation of Executive Order No. 11821. We hold, therefore, that the district court erroneously set aside the revised regulations in their entirety because of alleged deficiencies in the impact statement.

III.

Appellants assert that the district court's conclusion that the USDA exceeded its statutory authority in promulgating the disputed regulations is plainly wrong. Specifically, the court found the compulsory yield provision of the new regulations, 40 Fed. Reg. at 11538, which requires that all beef submitted for grading be graded for both quality and yield, to be inconsistent with the voluntary tone of 7 U.S.C. § 1622(h), 395 F. Supp. at 931.

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21 (continued)
the "zone of interests" facet of the constitutional test of standing. As we have noted, the purpose of the Executive Order is to help implement the President's personal economic policies. Appellees have not shown that the order was designed for their benefit. *Cf. Acevedo v. Nassau County, supra* at 1082-83.

22 *Contra, Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971).

As we have seen, under § 1622(h) the Secretary is directed and authorized to "inspect, certify, and identify the class, quality, quantity, and condition of agricultural products . . . under such rules and regulations as [he] may prescribe." Section 1622(h) specifically provides that no person be required to use the "service authorized by this subsection." The Secretary urges that this language permits him to bundle the Department's grading services together and thus require applicants to either take or refuse the entire bundle.

We turn, then, to an analysis of the statute. In matters of statutory construction, we are guided by "the provisions of the whole law, and . . . its object and policy." *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1111-12 (8th Cir. 1973), *citing Richards v. United States*, 369 U.S. 1, 11 (1962). "The practical inquiry in litigation is usually to determine what a particular provision, clause, or word means," but to answer it one must refer to the "leading idea or purpose of the whole instrument." 2 J. Sutherland, Statutory Construction § 4703, at 336 (3d ed. 1943). The principal purpose of the Agricultural Marketing Act of 1946 was "to promote through research, study, experimentation, and, . . . cooperation among Federal and State agencies, farm organizations, and private industries, a scientific approach to the problems of marketing, transport[ing] and distribut[ing] . . . agricultural products." 1946 U.S. Code Cong. Service 1586. To effectuate the purposes of the Act, Congress in § 1622 delegated a broad range of duties to the Secretary of Agriculture relating to agricultural products.[23] The emphasis the Act places on a

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[23] Under §§1622(c) and 1622(h), the following goals are relevant: (1) to develop and improve standards of quality, condition, quantity, (continued)

scientific approach to solving the problems of the industry suggests that Congress intended the Secretary to freely use his expertise. Consideration of the literal meaning of the words employed sheds additional light on the subject. The key language is "service authorized by this subsection." It is presumed that Congress has used a word in its usual and well-settled sense. *See Community Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969). The use of the term "service" in the singular rather than the plural form supports the Secretary's theory that he can offer the Department's beef grading services as a single "package." For the foregoing reasons, we conclude that the Secretary is authorized to use his expertise to combine the Department's beef grading services so long as the program as a whole facilitates the congressional goals set forth in §1622 (c) and § 1622(h).

IV.

This brings us to an analysis of the substantive merits of the new regulations. Appellees contended at trial and assert here that the USDA acted arbitrarily and capriciously in promulgating the revised regulations. They specified three respects in which, in their view, the "compulsory yield" provision was defective. In addition to the issues previously discussed, their complaints focused upon prac-

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[23] (continued)
and grade to encourage uniformity and consistency in commercial practice; (2) to market agricultural products to the best advantage; (3) to facilitate the trading of agricultural products; and (4) to make available quality products to consumers.

tical problems inherent in compulsory yield grading, its alleged ineffectiveness, inflationary impact, and asserted inaccuracies in the USDA yield grade formula currently used. They also launched a multi-faceted attack on the new quality grade standards, especially its effect on the palatability of beef and the price of Choice graded beef. Finding "substantial evidence" to support the new quality grade standards, the district court resolved this issue favorable to appellants. Because appellees failed to file a cross-appeal, they may not now claim that the new quality grade regulations are without sufficient evidentiary support. *See Tiedeman v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 513 F.2d 1267, 1272 (8th Cir. 1975).[24] Consequently, the sole issue for our consideration is whether under the applicable standard of review there was an adequate basis in the administrative record for the revised yield grade regulations.[25] Ordinarily, we would remand this matter to the trial court for consideration of of the alleged arbitrariness of the regulation, but it is not necessary to do so in this case because the complete administrative record and the transcript of the trial court proceedings are before us. *See Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 301 (8th Cir. 1972).

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[24] Appellees' citation of Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc., 419 U.S. 281, 284 (1974), holding that agency findings based on substantial evidence may "nonetheless reflect arbitrary and capricious action," is inapposite.

[25] The trial court never reached this question. Its order enjoining implementation of the new regulations was based solely on questions of statutory authority and compliance with the Executive Order. *See* II and III, *supra*.

Appellees concede that under the guidelines enunciated in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and *Camp v. Pitts*, 411 U.S. 138 (1973), the appropriate standard of review for regulations promulgated pursuant to the "notice and comment" procedure of the Administrative Procedure Act, 5 U.S.C. § 553(c) (informal rulemaking) is that specified by 5 U.S.C. § 706(2)(A), which authorizes a reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] *See National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700-01 (2d Cir. 1975); *National Tire Dealers Ass'n, Inc. v. Brinegar*, 491 F.2d 31, 34-35 (D.C. Cir. 1974); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1005 (1st Cir. 1973); *Boating Industry Ass'n v. Boyd*, 409 F.2d 408 411 (7th Cir. 1969).[27] Under the arbitrary and capricious standard of review, the reviewing court is to engage in a substantial inquiry into the facts, but is not empowered to substitute its judgment for that of the expert agency. The court is to consider only whether the disputed regulations were based on "consideration of the relevant factors" or whether there was a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* at 416. *See CPC International v. Train*, 515 F.2d 1032, 1044 (8th Cir. 1975). To have the regulations promulgated pursuant to

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[26] We have already held, under II and III, *supra*, that the agency action was "otherwise in accordance with law."

[27] *See also* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 622n.19 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 749 (1972); *contra*, Chrysler Corp. v. Department of Transportation, 472 F.2d 659, 669 (6th Cir. 1972) (applying substantial evidence test).

the notice and comment procedure of § 553(c) set aside, the opponents must prove that the regulations are without rational support in the record. *See First Nat'l Bank v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974). The reviewing court's inquiry into the facts is further circumscribed by language in *Overton Park* prohibiting *de novo* review except when agency action is adjudicatory in nature and agency factfinding procedures are inadequate, or when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. 401 U.S. at 415. The parties agree that neither situation exists here. Their dispute focuses rather on the extent to which a reviewing court in conducting the "plenary review" mandated by *Overton Park* can go outside the administrative record to hear expert testimony on the merits of the disputed regulations.[28]

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[28] In *Overton Park* the court stated

> [t]hat [plenary] review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their action . . . . [W]here there are administrative findings that were made at the same time as the decision, . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may

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Our consideration of the transcript of the trial court proceedings and the District Judge's memorandum opinion convince us that the district court, while sometimes articulating the correct standard of review, nonetheless exceeded the narrow limits imposed by *Overton Park*.[29] The district

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[28] (continued)

be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings . . . that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "*post hoc* rationalization" and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

401 U.S. at 420-21 (citations omitted).

[29] THE COURT: I can tell you right now that I am not going to substitute my judgment for the Secretary, because he has more expertise in this than I do.

All I am going to inquire into is whether he did act within the scope of his authority under the Act and also whether he acted arbitrarily and capriciously.

Tr., vol. 1, at 54.

THE COURT: I don't intend to have a de novo review.... I want to know if there is substantial evidence to back up whether or not the Secretary acted arbitrarily and capriciously.

Tr., vol. 1, at 47.

5. The Court has examined the following references . . . . These references convince the Court that the Department had *substantial evidence* upon which to change the maturity-marbling relationship. . . .

395 F. Supp. at 927.

court conducted a ten day evidentiary hearing during which it heard the expert testimony of private individuals and USDA officials on the merits of the regulations and, on the basis of that testimony, independently weighed the evidence and reached its own conclusions. In these respects the district court erred.[30] For example, in concluding that the Packers' grading costs would roughly double under the new regulations, 395 F. Supp. at 928, the district court apparently rejected testimony by David Hallett, Chief of the Meat Grading Branch, USDA and Andrew Rot, Supervisor of the Meat Grading Branch at Omaha, Nebraska, that any increase would be immaterial. Addressing itself to the merits of the new yield grade regulations, the district court found "no necessity for compulsory yield grading" and that "no appreciable benefit [would] result from compulsion." 395 F. Supp. at 931. The full administrative record, which included numerous research studies and over 4,000 comments, and the Department's construction of the evidence, were before the district court. The expert testimony heard at trial offered little that was new. In our view, unless an inadequate evidentiary development before the agency can be shown and supplemental information submitted by the agency does not provide an adequate basis for judicial

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[30] Appellees' contention that appellants waived their right to object to the admission of evidence in addition to the material contained in the administrative record is without merit. At the outset appellants requested the trial court to limit the scope of the inquiry. Only after this request was denied did trial counsel, as a precautionary measure, call expert witnesses to testify on the merits of the regulations. Even if we were to assume that appellants did in fact consent to a trial *de novo*, the result is the same. As we have noted, the district court was not empowered to conduct a *de novo* review.

review, the court in conducting the plenary review mandated by *Overton Park* should limit its inquiry to the administrative record already in existence supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, note 27 *supra; National Nutritional Foods Ass'n v. Weinberger*, *supra* at 701; *Bradley v. Weinberger*, 483 F.2d 410, 415 (1st Cir. 1973).

We proceed to an independent examination of the record to determine whether the Department acted arbitrarily or capriciously in promulgating the regulation. The principal thrust of appellees' argument is that because of alleged inaccuracies in the USDA yield grade equation and its subjective application by USDA graders, compulsory yield grading will not achieve its purposes – to force the wholesale market for beef and cattle to reflect the full retail sales value differences associated with differences in yield. 40 Fed. Reg. at 11536. USDA statistics indicate that for Choice beef carcasses there is between a $5.00 and $6.00 per hundred weight difference in value between adjacent yield grades. Tr., vol. 11, at 1272-73. Under current marketing practices, approximately 75 percent of slaughter cattle is purchased and paid for on a live weight basis. Because the packer-buyer uses a system of averages to bid for a pen of slaughter cattle, producers presently have little incentive to increase the production of high-yielding slaughter cattle. Tr., vol. 13, at 1478-91. It is the Department's view that if the producers were paid a substantial premium for beef carcasses qualifying for yield grades 1 and 2, they would respond by providing leaner beef with less waste. 40 Fed. Reg. at 11536. The administrative record shows and the Secretary concluded that because cattle being slaughtered today are younger and heavier

than those marketed when the original yield grade study was made in the late 1950's,[31] the prediction equation currently used may tend to underestimate actual retail yield in certain carcasses, particularly among the "exotic" breeds. We note, however, that a number of research studies contained in the administrative files indicate that the yield grade system is the most accurate method of estimating retail yield that is both economical and practical for use on a daily basis.[32] Appellees also question the usefulness of compulsory yield grading in light of the fact that, as we have noted, cattle are generally purchased on the hoof rather than on a carcass grade and weight basis. The yield grade stamps are not applied until the cattle are slaughtered, skinned, cleaned, and chilled for approximately twenty-four hours. Thus under existing buying practices the full use of yield grading as a pricing mechanism requires that the packer-buyer be able to subjectively evaluate

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[31] Murphey, *Estimating Yields of Retail Cuts from Beef Carcasses*, 19 J. Animal Science 1240 (1960).

[32] *See, e.g.*, Defendant's Exhibit 616 (variables used in the yield grade equation appear to be the most acceptable among those reported when accuracy, speed, and expense are considered; Defendant's Exhibit 662 (prediction equation using the same factors as those used in the USDA equations predicted percent boneless steak and roast meat with a multiple correlation of 0.97); Defendant's Exhibit 666 (equations containing the variables used in the USDA equation resulted in the highest coefficients of multiple determination for percent of boneless steak and roast meat); Defendant's Exhibit 670 (yield grade is most accurate method for predicting carcass composition, percent fat, and protein that can be readily applied by graders in a slaughter facility on large numbers of animals); Defendant's Exhibit 672 (USDA equation, with a simple correlation coefficient of 0.83, is one of the three most useful equations for predicting retail yield).

the retail yield of live cattle with a fair degree of accuracy. Studies by Wilson,[33] Gregory,[34] and Crouse,[35] tend to support the Department's position that subjective live appraisal by trained personnel has predictive value. Appellees place great emphasis on the fact that, in practice, federal graders estimate three of the four factors used in the yield grade equation by means of visual observation. We cannot say, however, that the subjective application of the yield grade equation substantially impairs its accuracy. Under USDA regulations the amount of external fat on a carcass is evaluated in terms of the thickness of the fat over the ribeye, but this measurement must be adjusted to reflect uneven deposition of fat on the carcass. 7 C.F.R. § 53.102(v). The regulations permit and provide for the adjustment which, as a practical matter, must be subjective. *Id.* The fact that no packer or other financially interested party has ever used the Department's appeals procedure to appeal a yield grade determination[36] convinces us that subjective evaluation of yield grades is not a real problem.

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33 Defendant's Exhibit 601 (concluding that fat thickness, which is the primary factor used in determining yield grade, can be predicted in live animals with moderate accuracy and finding a correlation between live estimate fat thickness and carcass cutability of 0.65).

34 Defendant's Exhibit 602 (concluding that approximately 25 to 35 percent of the variation in actual cutability can be accounted for on the basis of live estimates of cutability).

35 Defendant's Exhibit 631 (live animal estimates of carcass yield grades accounted for 51 and 65 percent of the variation in carcass yield and percentage of actual cutability.

36 Tr., vol. 11, at 1268-69.

We recognize that a compulsory yield grade program may cause a certain loss in flexibility by limiting packers' ability to merchandise certain kinds of carcasses, especially those that are overfat or damaged, and by precluding those packers who customarily trim exterior fat prior to grading from selling such fat as an edible byproduct. Nevertheless, the disadvantages are to be balanced against the expected beneficial effects of the program, including the creation of price signals that will induce producers to shift their resources to the production of leaner cattle.[37] This is precisely the type of situation that calls for the exercise of administrative expertise. Scientists at Texas A & M University's Agricultural Experiment Station recently compiled the data collection phase of a study designed to evaluate the prediction equation currently in use. If the Department concludes, after thorough analysis of the date, [sic] that the yield grade system is no longer suitable, the Secretary, under 7 U.S.C. § 1622(c),[38] should revise the regulations accordingly. Appellees argue that the Department acted prematurely in promulgating the new regulations before collection and analysis of the Texas data was complete. Perhaps it would have been more desirable, as a point of procedure, if the Department had waited. We

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[37] Community Economics Division, Economic Research Service, U.S. Dep't of Agriculture, *Economics of Beef Grades: Present and Proposed* [Preliminary Draft November 27, 1974].

[38] Under 7 U.S.C. § 1622(c), the Secretary is authorized and directed to "develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practice."

cannot disregard the fact, however, that the research studies previously discussed support the yield grade system currently in force.

V.

We hold that a district court reviewing regulations promulgated pursuant to the notice and comment procedure specified by 5 U.S.C. § 553(c) is not empowered to conduct a *de novo* hearing. All parties agreed, as did the District Judge, that *de novo* review was not appropriate. But our examination of the voluminous record of the trial proceedings convinces us that the district court did in fact hold a *de novo* trial[39] and that the expert evidence relating to the merits of the regulations influenced the District Judge's decision. We have thoroughly reviewed the administrative record with certain explanatory evidence and conclude that the compulsory yield provision of the new regulations cannot be set aside as arbitrary and capricious. For all of the foregoing reasons we dissolve the injunction issued by the district court and remand the case with instructions to enter a judgment declaring that the revised regulations are valid and dismissing the complaints filed by the Independent Meat Packers Association and the intervening plaintiffs.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[39] Perhaps our earlier remand for "a plenary hearing," 514 F.2d at 1120, motivated the district court to hold a full-scale trial.

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APPENDIX C

INDEPENDENT MEAT PACKERS ASSOCIATION,
an unincorporated association,

Appellee,

vs.

EARL L. BUTZ, Individually and in his capacity as United States Secretary of Agriculture, et al.,

Appellants.

No. 75-1244.

United States Court of Appeals,
Eighth Circuit.

April 15, 1975.

Meat-packers association brought action against United States Secretary of Agriculture and departmental officials to enjoin defendants from implementing and enforcing new quality and yield-grading standards for beef cattle. The United States District Court for the District of Nebraska, Robert V. Denney, J., granted a preliminary injunction, and an appeal was taken. The Court of Appeals held that court did not abuse its discretion in granting the preliminary injunction.

Judgment as modified affirmed.

1. Injunction No. 135

Court did not abuse its discretion when it granted meat-packers association a preliminary injunction enjoining United States Secretary of Agriculture and departmental officials from implementing and enforcing new quality and yield-grading standards for beef cattle.

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2. Injunction No. 147

In action by meat-packers association to enjoin United States Secretary of Agriculture and departmental officials from implementing and enforcing new quality and yield-grading standards for beef cattle, meat-packers association sustained its burden by showing probability of irreparable harm in event preliminary injunction did not issue.

Stephen L. Muehlberg, Asst. U. S. Atty., Omaha, Neb., for appellants.

Ben E. Kaslow and Frank F. Pospishil, Abrahams, Kaslow & Cassman, Omaha, Neb., for appellee.

Before LAY, BRIGHT and STEPHENSON, Circuit Judges.

ORDER

PER CURIAM.

This matter comes before the court on appeal from a preliminary injunction issued by the United States District Court for the District of Nebraska, the Honorable Robert V. Denney presiding. On April 11, 1975, the district court enjoined the defendants from implementing and enforcing the new quality and yield-grading standards for beef cattle, contained in regulations promulgated by the United States Department of Agriculture, which were to take effect on April 14, 1975. 40 Federal Register 11535 et seq., 7 C. F. R., Chap. 1, Part 53, dated March 12, 1975.

[1] This court, after hearing oral arguments and considering briefs on the matter, finds the district court did not abuse its discretion by enjoining the implementation of the new standards until a full hearing could be held on the plaintiff's complaint. In making this decision the court reminds the parties that our review does not go to the merits of the complaint; the only question before this court is whether the district court abused its discretion in granting plaintiff's preliminary injunction, and we find that it did not.

[2] The court finds, based upon the record before us, that serious questions are raised as to both the sufficiency of the inflationary impact statement made pursuant to Executive Order No. 11821 issued by President Ford on November 27, 1974, and whether the regulations are arbitrary and capricious under the standards of judicial review as contained in the Administrative Procedure Act, 5 U. S. C. § 701 et seq. In finding that the district court has not abused its discretion we hold that the Independent Meat Packers Association and its members have sustained their burden of proof by showing the probability of irreparable harm in the event the preliminary injunction did not issue.

In view of the great public interest involved, this court orders that the cause shall be remanded to the district court for a plenary hearing on the request for a permanent injunction and that a final decision of the district court be rendered within 45 days of this order; the court further orders that any appeal from the issuance or denial of the injunction shall be expedited by this court. In this regard the preliminary injunction of the

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district court is modified so as to terminate 45 days from the order of this court unless further extended by this court. The court further finds that the adequacy of the $5,000 bond now filed by the plaintiff, as required to be filed by the district court, shall be subject to a hearing within five days of the date of this order before the district court.

Judgment of the district court granting the preliminary injunction as modified herein is affirmed.

Mandate is ordered to issue forthwith.

APPENDIX D

Agricultural Marketing Act of 1946, as amended,

7 U. S. C. 1622(b)(c) and (h)

Duties of Secretary relating to agricultural products.

The Secretary of Agriculture is directed and authorized:

* * *

(b) To determine costs of marketing agricultural products in their various forms through the various channels and to foster and assist in the development and establishment of more efficient marketing methods (including analyses of methods and proposed methods), practices, and facilities, for the purpose of bringing about more efficient and orderly marketing, and reducing the price spread between the producer and the consumer.

* * *

(c) To develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.

* * *

(h) Inspection and certification of products in interstate commerce; certificates as evidence; penalties.

To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best

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advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection.

Council on Wage and Price Stability Act,

12 U. S. C. 1904, (2a) (3a) (Supp. 1975)

"Sec. 2 (a) The President is authorized to establish, within the Executive Office of the President, a Council on Wage and Price Stability (hereinafter referred to as the 'Council').

"Sec. 3(a) The Council shall—

"(1) review and analyze industrial capacity, demand, supply, and the effect of economic concentration and anticompetitive practices, and supply in various sectors of the economy, working with the industrial groups concerned and appropriate governmental agencies to encourage price restraint;

"(2) work with labor and management in the various sectors of the economy having special economic problems, as well as with appropriate government agencies, to improve the structure of collective bargaining and the performance of those sectors in restraining prices;

"(3) improve wage and price data bases for the various sectors of the economy to improve collective bargaining and encourage price restraint;

"(4) conduct public hearings necessary to provide for public scrutiny of inflationary problems in various sectors of the economy;

"(5) focus attention on the need to increase productivity in both the public and private sectors of the economy;

"(6) monitor the economy as a whole by acquiring as appropriate, reports on wages, costs, productivity, prices, sales, profits, imports, and exports; and

"(7) review and appraise the various programs policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation."

Administrative Procedure Act, 5 U. S. C. 706

Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

THE PRESIDENT

EXECUTIVE ORDER 11821

Inflation Impact Statements

In my address to the Congress on October 8, 1974, I announced that I would require that all major legislative proposals, regulations, and rules emanating from the executive branch of the Government include a statement certifying that the inflationary impact of such actions on the Nation has been carefully considered. I have determined that this objective can best be achieved in coordination with the budget preparation, legislative clearance, and management evaluation functions of the Director of the Office of Management and Budget.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States of America by the Constitution and laws of the United States, it is hereby ordered as follows:

Section 1. Major proposals for legislation, and for the promulgation of regulations or rules by any executive branch agency must be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated. Such evaluation must be in accordance with criteria and procedures established pursuant to this order.

Sec. 2(a). The Director of the Office of Management and Budget is designated and empowered, to the extent permitted by law, to develop criteria for the identification of major legislative proposals, regulations, and rules emanating from the executive branch which may have a significant impact upon inflation, and to prescribe procedures for their evalution.

(b) The Director, in carrying out the provisions of this order, may delegate functions to the head of any department or agency, including the Chairman of the Council on Wage and Price Stability, when appropriate in the exercise of his responsibilities pursuant to this order.

Sec. 3. In developing criteria for identifying legislative proposals, regulations, and rules subject to this order, the Director must consider, among other things, the following general categories of significant impact:

a. cost impact on consumers, businesses, markets, or Federal, State or local government;

b. effect on productivity of wage earners, businesses or government at any level;

c. effect on competition;

d. effect on supplies of important products or services.

Sec. 4. Each Federal department and agency must, to the extent permitted by law, cooperate with the Director of the Office of Management and Budget in the performance of his functions under this order, furnish him with such information as he may request, and comply with the procedures prescribed pursuant to this order.

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Sec. 5. This order expires December 31, 1976, unless extended prior to that time.

/s/ Gerald R. Ford

The White House,

November 27, 1974.

[FR Doc. 74-28157 Filed 11-27-74; 12:09 pm]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503

January 28, 1975 CIRCULAR NO. A-107

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Evaluation of the Inflationary Impact of Major Proposals for Legislation and for the Promulgation of Regulations or Rules

1. *Purpose.* This Circular prescribes guidelines for the identification and evaluation of major proposals for legislation and for the promulgation of regulations or rules.

2. *Authority.* Executive Order No. 11821 provided that major proposals for legislation and for the promulgation of regulations or rules by any Executive branch agency shall be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated. The Director of the Office of Management and Budget (OMB) was designated to develop criteria and prescribe procedures for carrying out the Order.

3. *Coverage.* For purposes of this Circular major proposals for legislation and for the promulgation of regulations or rules for which evaluations will be required will be determined by criteria developed by each Executive branch agency and approved by the Director of OMB in accordance with this Circular. Agencies which do not propose legislation or promulgate rules or regulations may be exempted from the requirements of this Circular (pursuant to Section 4(e)).

4. *Requirements.*

a. Agency heads are responsible for the development of criteria to determine which proposed legislation, regulations, or rules originated by the agency are "major" and therefore require evaluation and certification. In developing criteria, each agency head shall consider, among other things,

(1) cost impact on consumers, businesses, markets, or Federal, State, or local government;

(2) effect on productivity of wage-earners, businesses, or government;

(3) effect on competition;

(4) effect on supplies of important materials, products or services;

(5) effect on employment;

(6) effect on energy supply or demand.

b. Each agency shall develop procedures for the evaluation of proposals identified by application of approved criteria. The evaluation should include, where applicable,

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(1) an analysis of the principal cost or other inflationary effects of the action on markets, consumers, businesses, etc., and, where practical, an analysis of secondary cost and price effects. These analyses should have as much quantitative precision as necessary and should focus on a time period sufficient to determine economic and inflationary impacts.

(2) a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts. These benefits should be quantified to the extent practical, and

(3) a review of alternatives to the proposed action that were considered, their probable costs, benefits, risks, and inflationary impacts compared with those of the proposed action.

c. Agencies should comply with the requirements of this Circular with existing resources and personnel.

d. Identification criteria established by each agency shall be submitted to the Office of Management and Budget within 30 days of the issuance of this Circular for review and approval by OMB in consultation with the Council on Wage and Price Stability. Each agency shall designate an official to be responsible for compliance with this Circular and shall also notify OMB and the Council within the 30 days of that officer's name and title.

e. Agencies that do not propose major legislation, rules, or regulations, may be exempted from the requirements of this Circular by the Director of the Office of Management and Budget, acting in consultation with the Council on Wage and Price Stability. Requests for

exemption should be submitted to OMB within 30 days of issuance of this Circular.

5. *Disclosure.*

a. As provided in Executive Order No. 11821, major proposals for legislation and for the promulgation of regulations or rules by any Executive branch agency shall be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated. The statement of certification should be repeated whenever the proposal is published or issued. Upon request, agencies shall provide the Office of Management and Budget with the information necessary to ascertain that the approved criteria and procedures are adequately implemented.

b. When legislative proposals determined to warrant evaluation are forwarded to OMB for review and clearance pursuant to OMB Circular No. A-19 (Revised), agencies should furnish upon request appropriate data and analyses.

c. After a legislative proposal is forwarded to the Congress, economic data and analyses developed in evaluating the inflationary impact of the proposal along with other data and analyses concerning the overall impact of the proposal will, of course, be furnished to the Congress, as part of the overall justification of the proposal.

d. With respect to major proposals for rules or regulations, the proposing agency shall also, at the time it first certifies it has evaluated the inflationary impact of the proposal, submit to the Council on Wage and Price Stability a copy of the proposed rule or regulation, the

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accompanying certification, and a brief summary of the agency's evaluation pursuant to Section 4(b) above.

6. *Responsibilities.*

a. *Council on Wage and Price Stability.* Each Executive branch agency should be prepared to respond to requests for information from the Council on Wage and Price Stability, or from other authorized agencies, concerning the identification or evaluation of a major proposal for legislation, rule, or regulation or of a particular class of proposals.

b. *The Office of Management and Budget.* The Office of Management and Budget will cooperate with the agencies in developing criteria and evaluation procedures in compliance with this Circular.

c. *Interim Provisions.* In the interim prior to final approval of criteria, agency heads are responsibile for identifying which proposed legislation, regulations, or rules originating from their agency require evaluation and certification. In making such determinations, agency heads shall consider the categories of impact in Section 4(a) of this Circular. For assistance, agencies may consult the following: For legislative proposals, the Assistant Director for Legislative Reference (OMB), telephone 395-4864; or for proposed regulations or rules, the Assistant Director for Government Operations and Research (Council on Wage and Price Stability), telephone 456-6493.

7. *Inquiries.* Inquiries and requests for other assistance should be directed to the Associate Director for Economics and Government (OMB), telephone 395-4844 (code 103).

ROY L. ASH
DIRECTOR

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-940

CONSUMER FEDERATION OF AMERICA, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

No. 75-995

INDEPENDENT MEAT PACKERS ASSOCIATION, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

No. 75-996

NATIONAL ASSOCIATION OF MEAT PURVEYORS, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of a decision of the court of appeals that sustained the Secretary of Agriculture's re-

vised beef grading regulations.[1]

On March 12, 1975, the Secretary of Agriculture promulgated, pursuant to Section 203(h) of the Agricultural Marketing Act of 1946, 60 Stat. 1087, as amended, 7 U.S.C. 1622(h),[2] revised regulations governing the federal grading of carcass beef. The regulations reduced the amount of internal fat (marbling) that the beef must contain to come within each federal quality grade, and required that beef submitted for quality grading also be graded for yield.[3]

The regulations were promulgated in accordance with informal rulemaking procedures prescribed by the Administrative Procedure Act, 5 U.S.C. 553(c), and were accompanied by an exhaustive "Statement of Considerations" that set forth the purpose of the revisions, the history of prior regulations, the results of recent research

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[1]Petitioners' applications for a stay of the mandate of the court of appeals were denied by Mr. Justice Blackmun on January 9, 1976, and the revised regulations went into effect on February 23, 1976 (41 Fed. Reg. 2371).

[2]This provision in pertinent part authorizes the Secretary of Agriculture:

> To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products * * * under such rules and regulations as [he] may prescribe * * * to the end that agricultural products may be marketed to the best advantage * * * and that consumers may be able to obtain the quality product which they deserve * * *.

[3]The Department of Agriculture grades beef for "quality" and for "yield." "Quality" grades, such as "prime," "choice," "good," and "standard," measure palatability; "yield" grades indicate the ratio of meat to fat.

and analyses, the comments and criticisms on the proposed regulations that the agency had received from various interested groups, and the agency's evaluation of the comments and criticisms (40 Fed. Reg. 11535). The record upon which the Statement was based showed that revision in quality grading was favored by cattle producers, meat packers, meat scientists, and by at least one consumer group, the Center for Study of Responsive Law, Ralph Nader, Trustee.[4] Moreover, it was supported by six scientific studies (Pet. App. A. 9).[5] The proposed yield grade revision similarly was favored by cattle producers, institutional users, and meat scientists.

On April 1, 1975, petitioner Independent Meat Packers Association brought this suit in the United States District Court for the District of Nebraska, seeking, *inter alia*, to enjoin the Secretary of Agriculture from implementing the revised regulations. Petitioner alleged, *inter alia*, that the Secretary had no authority to promulgate the regulations and that the regulations violated Executive Order No. 11821, 39 Fed. Reg. 41501, which requires that proposed regulations be evaluated for their potentially inflationary impact (Pet. App. B. 2 to B. 3). On April 11, 1975, the district court granted petitioner's motion for a preliminary injunction and the court of appeals affirmed (514 F.2d 1119).

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[4] The Center stated that the proposed change in quality grading would benefit the consumer by reducing meat prices if the savings of the industry were passed on to the ultimate buyer, and by increasing the amount of meat protein per pound of lean, which would help reduce the incidence of heart disease. See Defendant's Exhibit No. 671 at 4, a copy of which has been lodged with the Clerk of this Court.

[5] "Pet. App." refers to the appendix in No. 75-940.

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On remand, the district court permitted petitioners National Association of Meat Purveyors, National Restaurant Association, and Consumer Federation of America to intervene as party plaintiffs. Petitioner Consumer Federation of America alleged, *inter alia*, that the Secretary's decision to revise the quality grading standards was not based upon substantial evidence.

After a trial, the district court found that the Secretary's decision to revise the quality grading standards was based upon substantial evidence (Pet. App. A. 9).[6] The court held, however, that the Secretary lacked statutory authority to implement the proposed revision in yield grading (Pet. App. A. 20), and that the Secretary had failed to comply with Executive Order No. 11821 in promulgating the revised regulations (Pet. App. A. 23). Accordingly, the district court permanently enjoined the Secretary from implementing the regulations (Pet. App. A. 24 to A. 25).

The court of appeals reversed the judgment of the district court, dissolved the injunction, and remanded the case to the district court with instructions to dismiss the complaint. The court held that Executive Order No. 11821 was not issued pursuant to a statutory mandate or delegation of authority from Congress but rather was intended primarily as "a managerial tool for implementing the President's personal economic policies" (Pet. App. B. 14); that petitioners had no standing to challenge the Secretary's alleged failure to observe the order because the order was not judicially enforceable by private action (Pet. App. B. 14 to B. 15); and that the Secretary had authority under 7 U.S.C. 1622(h) to implement the

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[6]The district court conducted a ten-day trial *de novo* that generated seventeen volumes of testimony and several hundred exhibits (Pet. App. B. 4).

revision in yield grading (Pet. App. B. 15).[7] The court of appeals declined to review the district court's finding that the Secretary's decision to revise the quality grading was supported by substantial evidence (Pet. App. B. 18).

1. The court of appeals correctly determined that Executive Order No. 11821 does not create a private right of action. An Executive Order, such as No. 11821, which is issued simply as a means of managing the executive branch, and not pursuant to a specific statute or to effectuate a statute, does not create a private right of action enforceable by third parties in the federal courts. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (C.A. D.C.); *Kuhl* v. *Hampton*, 451 F.2d 340 (C.A. 8).

2. The court correctly sustained the exercise of the Secretary's authority to promulgate the revised yield grading regulation that requires that all beef submitted for quality grading be graded as well for yield. Section 203(h) of the Agricultural Marketing Act, 7 U.S.C. 1622(h), authorizes the Secretary to conduct a federal beef grading program to "the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire." In conducting this program the Secretary must "develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards." 7 U.S.C. 1622(c). As the court of appeals noted, the Secre-

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[7] The court further ruled that the district court had exceeded the appropriate scope of review under 5 U.S.C. 706(2)(A) by conducting a *de novo* trial and should have limited its inquiry to the administrative record. The court undertook its own thorough inquiry into that portion of the administrative record dealing with the revision in yield grading and determined that the Secretary had not acted arbitrarily in promulgating that revision (Pet. App. B. 23 to B. 27).

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tary's decision to combine yield grading with quality grading clearly was authorized by these provisions.

3. The court correctly held that the appropriate standard of review of the Secretary's decision to issue the revised yield grading regulations was whether that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). *Camp* v. *Pitts*, 411 U.S. 138; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402. The court thoroughly reviewed the administrative record and correctly sustained the Secretary's decision under that standard.

4. Petitioner Consumer Federation of America contends that the court of appeals erred in declining to review the district court's finding (Pet. 9-12) that the Secretary's decision to issue the revised quality grading regulations was supported by substantial evidence. Petitioner, as an appellee in the court of appeals, had sought review of that finding, contending that insufficiency of the evidence was an alternative basis for affirming the judgment of the district court. It would have been preferable for the court of appeals to have reviewed the district court's finding with regard to the substantiality of the evidence. But in the circumstances of this case, the court of appeals' failure to review that finding does not warrant further prolongation of this litigation and unnecessary continued uncertainty in the industry. As we now demonstrate, there was ample basis for the Secretary's decision to revise quality grading standards.

In promulgating the new quality grading standards, the Secretary noted (40 Fed. Reg. 11537):

> Marbling-maturity requirement changes were strongly supported by producers, meat packers, and university meat scientists. Opposition was voiced by most consumers * * * . Opposition was based largely on (1) the fear of a significant reduction in the eating characteristics of Prime and Choice beef, and (2) the belief by consumers that they would have to pay "Choice grade prices for Good grade beef."

Neither of the consumers' concerns was justified.

The Secretary cited six separate published scientific studies finding that "for beef from cattle up to about 30 months of age, changes in maturity do not have a sufficiently significant effect on palatability to justify an increase in marbling" (*id.* at 11536). On the basis of these studies, the Secretary concluded (*id.* at 11537):

> [T]he increases in marbling with increases in maturity provided in the present standards for such beef are not necessary to insure a comparable degree of palatabilty. Therefore, the changed marbling-maturity relationships should provide greater uniformity of eating quality within each of the grades and thereby enhance consumer satisfaction and confidence in grades.

The district court reviewed the studies relied upon by the Secretary and concluded that they supported his decision (Pet. App. A. 9). Petitioners have produced no contrary scientific research evidence; indeed, one of their expert witnesses, Dr. Harold J. Tuma, testified that the results of the studies relied upon by the Secretary were valid (Tr. 907-908).[8]

As to the effect that the change in quality grading standards would have upon the price of beef, the Secretary concluded (40 Fed. Reg. 11537):

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[8] "Tr." refers to the transcript of trial proceedings.

> The slight change in marbling requirements should decrease the costs of producing Choice and Prime grade beef and should encourage their increased production. And, since the quality of beef in each of these grades is not significantly changed, the demand for these grades should not be affected. Thus, an increased supply coupled with an unchanged demand should result in lower prices for Choice and Prime grade beef.

This analysis, which was based in part upon a study by the Department of Agriculture's Economic Research Service (40 Fed. Reg. 11537), was corroborated by two agricultural economists at trial (Tr. 1414, 1574). The testimony of petitioners' only witness with a background in agricultural economics was not to the contrary (Tr. 790).

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

DOJ-1976-03